



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-45/49677

PRELIMINARY RECITALS

Pursuant to a petition filed June 26, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Ozaukee County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on August 22, 2001, at Port Washington, Wisconsin. A hearing set for July 25, 2001, was rescheduled at the petitioner's request.

The issue for determination is whether petitioner can reallocate more income to his community spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Carolyn Godersky, ESS
Ozaukee County Dept Of Social Services
121 W. Main Street
PO Box 994
Port Washington, WI 53074-0994

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Ozaukee County. His spouse is (petitioner spouse).
2. The petitioner's monthly income consists of Social Security and payments from the Wisconsin Retirement System. (petitioner spouse) monthly income consists of a pension, social security, an annuity, earned income, and interest income. The amount of income of each spouse was not in question and need not be listed separately.

3. At a case review on April 10, 2001, the county agency determined that the income of both the petitioner and (petitioner spouse) had increased.
4. On June 18, 2001, the county agency issued written notice to the petitioner advising that his cost of care liability would be 1,670.11 effective July 1, 2001. The petitioner filed a hearing request as to his cost of care liability.
5. The current Maximum Community Spouse Income Allocation is the lower of either (a) \$1,875 plus excess shelter expenses, or (b) \$2,175. In this case, \$2,175 is the lower figure, and it therefore constitutes the maximum income allocation that the county agency can allow in the absence of a hearing decision-directed amount. See *MA Handbook*, Appendix 23.6.0 (01-01-00).
6. The petitioner now owes \$3,500 to his nursing home due to unpaid bills. He is trying to pay \$100 per month.
7. The petitioner's spouse has identified monthly living expenses on Exhibits 1 and 2. From the listed expenses on Exhibit #2, I find that the following are basic maintenance needs from July 1, 2001, onward:

Mortgage/condo fee/tax	\$1,020.00
past debts	200.00
employment taxes/FICA	110.00
insurance	94.00
medicine	76.00
dental	15.00
other medical	15.00
utilities	189.00
transportation	250.00
food & household supplies	230.00
personal expenses	200.00
miscellaneous	<u>50.00</u>
MONTHLY TOTAL	2,449.00

DISCUSSION

First is a procedural matter. A hearing officer can only hear a matter on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by a county agency concerning MA must be filed within 45 days of the date of the action. Sections 49.45(5) and 49.21(1), Wis. Stats.; Income Maintenance Manual, II-G-3.4.0. A negative action can include the increase in a patient liability amount. The petitioner's appeal was filed on June 26, 2001. Thus, the earliest month that can be considered is June, 2001, as May 1, 2001 is more than 45 days earlier.

The federal Medicare Catastrophic Coverage Act of 1988 included extensive changes in State Medicaid eligibility determinations as they relate to spousal impoverishment where one spouse is a resident in a nursing home. The purpose of the new act was to protect a "community" spouse's assets and resources and designate how a spousal share would be computed. The Act also established a new minimum needs allowance for the community spouse at a specified percentage of the federal poverty line. Consequently the

Wisconsin Legislature enacted sec. 49.455, Wis. Stats., in order to bring the Wisconsin Medicaid program into conformity with federal law.

Section 49.455 specifically states that the department is to use the criteria of that statutory section in determining the eligibility for medical assistance under §§49.46 or 49.47, Wis. Stats., and the required contribution toward the care of an institutionalized spouse.

"Community spouse" refers to the person who is married to an institutionalized individual. See sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. See sec. 49.455(3), Wis. Stats. However, after an institutionalized person is found eligible for medical assistance (MA), he or she may allocate income to the community spouse.

If the community spouse's monthly income is below a certain amount, the institutionalized spouse may allocate some of his or her income to bring the community spouse's income up to that amount. As mentioned above, that amount is the lesser of \$2,175 or \$1,875 plus an excess shelter allowance. In this case, Sec. 49.455(4)(c), Wis. Stats., the Medical Assistance Handbook, Appendix 23.6.0., and sec. 49.455(4)(b), Wis. Stats., allows an increase in the monthly community spouse allotment by order of a "fair hearing examiner" or a court. See also MA Handbook, Appendix 23.6.0. In order to increase the allotment, the fair hearing examiner must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for the fair hearing examiner to use expenses, they must meet "necessary and basic maintenance needs" MA Handbook, Appendix 23.6.0. "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". See sec. 49.455(8)(c), Stats. (Emphasis added.)

Because the community spouse is essentially asking state taxpayers to give the nursing home resident more financial support in the form of MA, I find that every expense is not automatically appropriate for inclusion, even if it is not frivolous. As an example, by following this logic, I do not include any dues or donations to religious or charitable donations as an allowable expense. The reason is the fundamental basis of the program, which does not allow for the accumulation of income for something that is not a "maintenance" need:

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (6)(b), the hearing officer shall determine an amount adequate to provide for the community spouse's needs. In this paragraph, "exceptional circumstances resulting in financial duress" means situations that result in *the community spouse not being able to provide for his or her own necessary and basic maintenance needs*. The agency shall use the amount determined by the hearing officer in place of the minimum monthly maintenance needs allowance determined under sub. (6)(b). (*emphasis added*)

In *Tannler v. DHSS*, 211 Wis.2d 179 (1997), Chief Justice Shirley Abrahamson stated the following in a concurring opinion:

Although Congress requires divestment, it has recognized that elderly persons should not be forced into impoverishment in order to qualify an

institutionalized spouse for medical assistance. Thus Congress has determined that spouses of those who need long-term care should not be driven by the government into **poverty**. (*Emphasis added.*)

See *Tannler*, at 192. The goal is the prevention of poverty of the community spouse, not the ability to maintain a middle class lifestyle or any other lifestyle. It is this purpose that guides the determination in these cases.

I find that the payments of past nursing home and other health care charges qualify as an exceptional circumstance. Having found an exceptional circumstance, I may increase the income allocation. The next step is to determine what expenses claimed by the petitioner are for "necessary and basic maintenance needs".

In this case, the community spouse argues that she can not get by on the \$2,175 standard. The county agency does not have discretion to allocate income to them that would cause their income plus allocation total to exceed the \$2,175 maximum allowance.

With some slight adjustments to amounts, I accept all of the expenses listed in Exhibit #1 except the one dealing with life insurance. There is a question as to whether the cost of life insurance in this type of case may be disregarded. In MRA-13/18890, ALJ Sean Maloney found that life insurance was not a necessary and basic need. In MRA-28/38771, ALJ Gary Wolkstein found that payments for life insurance on the community spouse could be budgeted as a minimum monthly need because of the presence of two minor children. I agree that when minor children are in the community home, life insurance is always a basic need due to the parent's legal obligation for them. I would also find that a minimal amount of life insurance for either spouse may be necessary to take care of that person's final expenses such as funeral costs. In this case, there is no minor child and no indication that the life insurance is for burial expenses. Thus, I cannot include the term life insurance payments in my calculations.

Based on the above, I have determined that the proposed allowance is short of what is needed to cover basic living expenses at this time. I find that the community spouse has monthly allowance needs of \$2,449 as of June 1, 2001. That amount is subject to change based on the future needs and expenses of the community spouse. As discussed above, exceptional circumstances resulting in financial duress are present. See s.49.455(8)(c), Wis. Stats.

CONCLUSIONS OF LAW

1. Due to exceptional circumstances, the petitioner's family requires an income allowance of \$2,449 starting June 1, 2001, to avert financial duress.
2. The county shall use a \$2,449 Maximum Community Spouse Income Allowance as of that date.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to set the petitioner's Maximum Community Spouse Income Allowance at \$2,449 starting on June 1, 2001. The county agency will recalculate the petitioner's liability based on that amount. These actions shall be taken within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new

evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2001.

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
928/JAN

cc: Eileen Newby - Ozaukee Co.
Susan Wood